Shaik Zolkaffily bin Shaik Natar & Ors (sued as trustees of the estate of Sheik Eusoff bin Sheik Latiff, deceased) v Majlis Agama Islam Pulau Pinang dan Seberang Perai

HIGH COURT (PENANG) — CIVIL SUIT NO 22-103 OF 1995
JEFFREY TAN J
11 APRIL 1997

Civil Procedure *— Pleadings — Striking out — Writ and statement of claim — Whether claim by plaintiff should be struck out under O 18 r 19(1)(a) and the inherent jurisdiction of the court — Whether it was plain or obvious that the claim was unsustainable — Rules of the High Court 1980 O 18 r 19(1)(a)*

Islamic Law *— Jurisdiction — Syariah court — Whether Syariah court had jurisdiction to hear claims involving 'wakaf land' — Whether jurisdiction of syariah court can be derived by implication — Federal Constitution art 121(1A) & State List Ninth Schedule*

Civil Procedure *— Jurisdiction of the court — High Court — Whether High Court had jurisdiction to hear claims involving 'wakaf land' — Whether unconditional appearance by the defendant amounted to submission to jurisdiction of the court — Federal Constitution art 121(1A)*

Civil Procedure *— Jurisdiction of the court — Syariah court — Whether Syariah court had jurisdiction to hear claims involving 'wakaf land' — Whether jurisdiction of syariah court can be derived by implication — Federal Constitution art 121(1A) & State List Ninth Schedule*

The plaintiffs were seeking, inter alia, a declaration that Lots 55(1) and 193(2) Georgetown ('the lands') be reverted to the estate of the deceased and an order vesting the lands to the estate of the deceased or in the alternative damages and an injunction to restrain the defendant and its agents or servants from disposing, interfering or otherwise dealing with the lands until final disposal of the action. The defendant's application to strike out the plaintiff's writ of summons and amended statement of claim was dismissed with costs by the senior assistant registrar and the defendant appealed to the judge in chambers. The application to strike out was made under O 18 r 19(1)(a) of the Rules of the High Court 1980 and under the inherent jurisdiction of the court.

The defendant, although having entered an unconditional appearance in the High Court, alleged that the lands in dispute was 'wakaf' land and as such the Syariah courts had exclusive jurisdiction to hear and determine the dispute. It was argued that the unconditional appearance was a waiver of any irregularity and was a submission to the jurisdiction of the court. The main issues before the court were: (i) whether the plaintiff's writ of summons and amended statement of claim ought to be dismissed; and (ii) whether the High Court has jurisdiction to grant the reliefs sought.

Held, dismissing the appeal:

(1) The defendant's unconditional appearance, if it was a submission to the jurisdiction of the High Court, would only be real if the High Court had authority to adjudicate on the plaintiff's claim (see p 291H); *Tengku Ali ibni Almarhum Sultan Ismail v Kerajaan Negeri Terengganu Darul Iman* [1994] 2 MLJ 83 followed.

(2) When considering alone the allegations in the pleadings, it was neither plain nor obvious that the claim was unsustainable. Indeed, neither the claim nor the defence was not without some chance of success. The affidavit evidence admissible under the inherent jurisdiction of the court to strike out the claim was merely an affirmation of the facts alleged in the pleadings, and did not bear out that the plaintiff's claim was obviously frivolous or vexatious or an abuse of the process of court. That it was not contended during submissions that the claim disclosed no reasonable cause of action or that it was frivolous, vexatious or an abuse of the court's process, not arguing and justifying therefore the grounds under which the application was brought, belied the seriousness of the application and that alone would be reason enough to dismiss this application (see p 299C–D); *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1993] 3 MLJ 36 followed.

(3) When there is a challenge to the jurisdiction of the High Court, the key is not whether the High Court had jurisdiction, but whether jurisdiction of the matter at hand is with the Syariah court. Article 121(1A) of the Federal Constitution is not the written law giving jurisdiction to the Syariah court. It merely settles the issue of the concurrent jurisdiction of the High Court, in that there is none when the jurisdiction of a matter is given to the Syariah court. Jurisdiction to the Syariah court is given by state laws but if state law did not confer on the Syariah court any jurisdiction to deal with any matter in the State List, the Syariah court is precluded from dealing with the matter and jurisdiction cannot be derived by implication (see p 293F–H); *Mohamed Habibullah bin Mahmood v Faridah bte Dato' Talib* [1992] 2 MLJ 793, *Tan Sung Mooi v Too Miew Kim* [1994] 3 MLJ 117 and *Ng Wan Chan v Majlis Ugama Islam Wilayah Persekutuan (No 2)* [1991] 3 MLJ 487 followed.

In this case, jurisdiction had not been given to the Syariah court to grant the declaration of vesting order or the alternative relief. Neither was there any power to the Syariah court to adjudicate on the will and deed of settlement. That jurisdiction rests with the civil courts, and there was no impediment to this court hearing and adjudicating on the will and deed of settlement and to grant or refuse the relief sought (see p 299G).

[Bahasa Malaysia summary

Plaintif-plaintif menuntut, antara lain, satu deklarasi bahawa Lot 55(1) dan 193(2) Georgetown ('tanah-tanah tersebut') dikembalikan kepada

harta pusaka si mati dan satu perintah meletakhak tanah-tanah tersebut kepada harta pusaka si mati atau sebagai alternatifnya ganti rugi dan injunksi untuk menghalang defendan dan ejen-ejen atau pekerja-pekerjanya daripada melupuskan, campur tangan atau berurusan dengan tanah-tanah tersebut sehingga penyelesaian akhir tindakan itu. Permohonan defendan untuk membatalkan writ saman plaintif dan pernyataan tuntutan pindaan telah ditolak dengan kos oleh penolong kanan pendaftar dan defendan membuat rayuan kepada hakim dalam kamar. Permohonan untuk pembatalan dibuat di bawah A 18 k 19(1)(a) Kaedah-Kaedah Mahkamah Tinggi 1980 dan di bawah bidang kuasa sedia ada mahkamah.

Defendan, walaupun telah memasukkan kehadiran tanpa syarat di Mahkamah Tinggi, mendakwa bahawa tanah-tanah yang dipertikaikan adalah tanah wakaf dan dengan itu mahkamah Syariah mempunyai bidang kuasa eksklusif untuk mendengar dan menentukan pertikaian itu. Adalah dihujahkan bahawa kehadiran tanpa syarat merupakan satu penepian apa-apa luar aturan dan merupakan penyerahan kepada bidang kuasa mahkamah. Isu-isu utama di hadapan mahkamah adalah: (i) sama ada writ saman plaintif dan pernyataan tuntutan pindaan patut ditolak; dan (ii) sama ada Mahkamah Tinggi mempunyai bidang kuasa untuk memberikan relief-relief yang dipohon.

Diputuskan, menolak rayuan:

(1) Kehadiran tanpa syarat defendan, sekiranya merupakan penyerahan kepada bidang kuasa Mahkamah Tinggi, hanya akan menjadi kenyataan jika Mahkamah Tinggi mempunyai kuasa untuk memutuskan tuntutan plaintif (lihat ms 291H); *Tengku Ali ibni Almarhum Sultan Ismail v Kerajaan Negeri Terengganu Darul Iman* [1994] 2 MLJ 83 diikut.

(2) Apabila dipertimbangkan dengan sendirinya pengataan-pengataan dalam pliding, adalah tidak mudah atau jelas bahawa tuntutan itu tidak dapat diterima. Malahan, tuntutan dan pembelaan bukannya tidak mempunyai peluang untuk berjaya. Keterangan afidavit yang boleh diterima di bawah bidang kuasa sedia ada mahkamah untuk membatalkan tuntutan hanyalah satu pengesahan fakta-fakta yang dikatakan dalam pliding, dan tidak menunjukkan bahawa tuntutan plaintif adalah dengan jelasnya remeh dan menyusahkan atau penyalahgunaan proses mahkamah. Dengan tidak menegaskan semasa penghujahan bahawa tuntutan itu tidak mendedahkan kausa tindakan yang munasabah atau ia adalah remeh, menyusahkan atau penyalahgunaan proses mahkamah, dan tidak menghujahkan dan menjustifikasikan alasan-alasan bagi membuat permohonan itu, tidak menunjukkan bahawa permohonan itu adalah serius dan itu sahaja boleh dijadikan sebab yang cukup untuk menolak permohonan ini (lihat ms 299C–D); *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1993] 3 MLJ 36 diikut.

(3) Apabila terdapat cabaran kepada bidang kuasa Mahkamah Tinggi, kuncinya bukan sama ada Mahkamah Tinggi mempunyai bidang

kuasa, tetapi sama ada bidang kuasa mengenai perkara yang dipersoalkan adalah terdapat pada mahkamah Syariah. Perkara 121(1A) Perlembagaan Persekutuan bukannya undang-undang bertulis yang memberikan bidang kuasa kepada mahkamah Syariah. Ia hanya menyelesaikan isu bidang kuasa bersama Mahkamah Tinggi, dalam mana tidak terdapat apabila bidang kuasa mengenai sesuatu perkara diberikan kepada mahkamah Syariah. Bidang kuasa kepada mahkamah Syariah diberikan oleh undang-undang negeri tetapi jika undang-undang negeri tidak mengurniakan apa-apa bidang kuasa untuk berurusan dengan apa-apa perkara dalam Senarai Negeri, mahkamah Syariah dihalang daripada berurusan dengan perkara itu dan bidang kuasa tidak boleh diperolehi melalui implikasi (lihat ms 293F–H); *Mohamed Habibullah bin Mahmood v Faridah bte Dato' Talib* [1992] 2 MLJ 793, *Tan Sung Mooi v Too Miew Kim* [1994] 3 MLJ 117 dan *Ng Wan Chan v Majlis Ugama Islam Wilayah Persekutuan (No 2)* [1991] 3 MLJ 487 diikut.

Dalam kes ini, bidang kuasa tidak diberikan kepada mahkamah Syariah untuk memberikan deklarasi perintah letakhak atau relief alternatif. Juga, tidak terdapat kuasa kepada mahkamah Syariah untuk membuat keputusan ke atas wasiat dan suratikatan penyelesaian. Bidang kuasa itu terletak pada mahkamah sivil, dan tiada penghalang kepada mahkamah ini untuk mendengar dan memutuskan atas wasiat dan suratikatan penyelesaian dan untuk memberi atau menolak relief yang dipohon (lihat ms 299G).]

Notes

For cases on striking out of writ and statement of claim, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2754–2765.

For cases on the jurisdiction of the High Court and Syariah court, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2257–2258 and 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 384–391.

Cases referred to

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corp Bhd [1993] 3 MLJ 36 (folld)

Barkath Ali bin Abu Backer v Anwar Kadir Abu Backer & Ors [1997] 4 MLJ 389 (refd)

Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah Bukit Mertajam & Anor [1992] 1 MLJ 1 (refd)

Drummond-Jackson v British Medical Association & Ors [1970] 1 WLR 668 (refd)

G Rethinasamy v Majlis Ugama Islam, Pulau Pinang & Satu lagi [1993] 2 MLJ 166 (refd)

Lim Chan Seng lwn Pengarah Jabatan Agama Islam Pulau Pinang & Yang lain [1996] 3 CLJ 231 (refd)

Majlis Agama Pulau Pinang lwn Isa Abdul Rahman & Satu lagi [1992] 2 MLJ 244 (refd)

Mohamed Habibullah bin Mahmood v Faridah bte Dato' Talib [1992] 2 MLJ 793 (folld)
New Straits Times (M) v Kumpulan Kertas Niaga Sdn Bhd & Anor [1985] 1 MLJ 226 (refd)
Ng Wan Chan v Majlis Ugama Islam Wilayah Persekutuan (No 2) [1991] 3 MLJ 487 (folld)
Noor Jahan bte Abdul Wahab v Md Yusoff bin Amanshah & Anor [1994] 1 MLJ 156 (refd)
Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor [1996] 1 MLJ 113 (refd)
Penang Development Corp v Khaw Chin Boo & Anor [1993] 2 MLJ 161 (refd)
Raja Zainal Abidin bin Raja Hj Tachik & Ors v British-American Life & General Insurance Bhd [1993] 3 MLJ 16 (refd)
Sea Breeze Navigation Co SA v 'Hsing An' Owners [1974] 1 MLJ 45 (refd)
Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 MLJ 97 (refd)
Tan Sung Mooi v Too Miew Kim [1994] 3 MLJ 117 (folld)
Tengku Ali ibni Almarhum Sultan Ismail v Kerajaan Negeri Terengganu Darul Iman [1994] 2 MLJ 83 (folld)
Tractors Malaysia v Tio Chee Hing [1975] 2 MLJ 1 (refd)
Tuan Hj Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd [1996] 1 MLJ 30 (refd)
Tun Datuk Hj Mustapha bin Datu Harun v State Legislative Assembly of Sabah & Anor [1993] 1 MLJ 26 (refd)
Zainal Abidin bin Hj Abdul Rahman v Century Hotel Sdn Bhd [1982] 1 MLJ 40 (refd)

Legislation referred to

Administration of Islamic Religious Affairs of the State of Penang 1993 s 48
Civil Law Act 1956 s 3(1)(a)
Courts of Judicature Act 1964 ss 22, 23, 24, 25
Federal Constitution arts 74, 77, 121(1A), Ninth Schedule
Rules of the High Court O 18 rr 19(1)(a), (2)

Ku Abdul Rahman Ku Ismail (Zakaria Arifin with him) (*Aziz Zakaria Shaiful & Wan*) for the plaintiffs.
Ong Keng Leong (*Abu Bakar As-Sidek* with him) (*Ghazi & Lim*) for the defendant.

Cur Adv Vult

Jeffrey Tan J: This is the defendant's appeal to judge in chambers against the decision of the learned senior assistant registrar ('the SAR') dismissing with costs the defendant's application (encl 9 — the ground relied on was not stated) to strike out the plaintiff's writ of summons and amended statement of claim.

According to Mr Ong Keng Leong, for the defendant, the application was brought under O 18 r 19(1)(a) of the Rules of the High Court 1980 ('the RHC') and the inherent jurisdiction of the court. Mr Ku Abdul Rahman, for the plaintiffs, did not demur to the contrary, and accordingly encl 9 was reheard on the grounds stated by Mr Ong.

Each side filed an affidavit (encl 8 from the defendant and encl 10 from the plaintiff). However, in an application under r 19(1)(a), be it to strike out an action or defence, it is settled law that no affidavit evidence 'shall be admissible' (see r 19(2)) and that the court considers only the pleadings for the purpose of determining whether the statement of claim discloses no reasonable cause of action or the defence discloses no defence (see *New Straits Times (M) v Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 1 MLJ 226). 'But in application on any of the other grounds ... or where the inherent jurisdiction of the court is invoked, affidavit evidence may be and ordinarily is used' (The English Supreme Court Practice (1995) Vol 1 para 18/19/6).

The Federal Court, per Gopal Sri Ram JCA in *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor* [1996] 1 MLJ 113 at pp 122–123 dictated it as follows:

> Subrule (2) of O 18 r 19 prohibits the use of affidavit evidence and confines the court to the four corners of a pleading only in applications made under para (a). It is settled beyond doubt that affidavit evidence is always admissible under an application made under other paragraphs of the first sub-rule or under the inherent jurisdiction of the court: see *Tractors Malaysia v Tio Chee Hing* [1975] 2 MLJ 1 and *Raja Zainal Abidin bin Raja Hj Tachik & Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16.

Therefore, in the instant application under r 19(1)(a), only the pleadings — and that will include the defence (it was filed after the learned SAR had delivered his decision), since an appeal to a judge in chambers from the decision of a registrar of the High Court is an actual rehearing and the judge treats the matter as though it comes before him for the first time (*Tuan Hj Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30, per Edgar Joseph Jr FCJ; see also *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97) — would be considered.

The amended statement of claim and the statement of defence read as follows:

Pindaan Semula Penyata Tuntutan

(1) Plaintif-plaintif di dalam tindakan ini adalah pemegang amanah dan juga benefisiari kepada harta pusaka peninggalan Sheik Eusoff bin Sheik Latiff, si mati.

(2) Defendan sepanjang tindakan ini adalah sebuah badan yang ditubuhkan di bawah Ordinan Pentadbiran Undang-Undang Islam 1956 yang beralamat di Lebuh Pantai, Pulau Pinang.

(3) Sheik Eusoff bin Sheik Latiff, si mati, meninggal dengan berwasiat dan mempunyai harta-harta seperti berikut:

A (a) Lot No 55(1), Mukim 13, Daerah Timur Laut, Pulau Pinang yang terkandung dalam Geran No 477 dan 1767 yang sekarang dikenali sebagai Lot No 1396 terkandung dalam Geran (First Grade) No 23631.

(b) Lot No 193(2), Bandar Georgetown, Daerah Timur Laut, Pulau Pinang dan sekarang dikenali sebagai Lot No 962, Seksyen 3, B Bandar Georgetown, Pulau Pinang terkandung dalam Geran (First Grade) No 21582 (selepas ini dirujuk sebagai 'harta tersebut').

(4) Sheik Eusoff bin Sheik Latiff, si mati telah meninggalkan suatu wasiat bertarikh 30 Disember 1892 (selepas ini dirujuk sebagai 'wasiat tersebut'). Butir-butir dan terma-terma yang terkandung di dalam wasiat tersebut akan dirujuk di dalam perbicaraan nanti. C

(5) Geran probet kepada harta pusaka Sheik Eusoff bin Sheik Latiff, si mati telah diperolehi pada 22 Oktober 1894 yang diberi kepada Mawan Bee @ Hajee Bee iaitu isteri yang sah kepada si mati, yang juga telah meninggal dunia.

(6) Merujuk kepada wasiat tersebut, harta peninggalan si mati dinyatakan D seperti berikut:

In trust during the lives of my said wife, Mawan Bee otherwise called Hajee Bee, my daughters, Rahimah Bee @ Wan Chee, Fatimah Bee @ Wan Teh, Zoharah Bee @ Wan Tam, Shaik Mohamed Bee @ Chay Aishah, my sons, the said Shaik Sathuck Ally Shah Meeah and Shaik Mohamed Noordin Meeah and my younger daughters, Habib Sah Bee E @ Habib and Khatijah Bee @ Jah Bee were all now living, and for a period of 21 years after the demise of the last survivor of them to reserve the said lands as a 'wakoff' during such period for the benefit of the Mohameden Mosque or Masjid called 'Sheik Eusoff's Mosque' which has been set apart and reserved by me as a wakoff in Penang aforesaid ... .

F (7) Waris-waris terakhir di antara anak-anak Sheik Eusoff bin Sheik Latiff, si mati sebagaimana yang disebut sebelum ini juga telah meninggal dunia dan 21 tahun juga telah luput.

(8) Harta tersebut sekarang ini adalah atas nama defendan.

(9) Berdasarkan wasiat Sheik Eusoff bin Sheik Latiff, tempoh 21 tahun G sebagaimana yang dinyatakan di dalam wasiat tersebut telah luput. Oleh yang demikian, plaintif-plaintif menerusi peguamcaranya, Tetuan Daud Thevendran & Partners telah melalui surat bertarikh 18 Februari 1995 meminta defendan mengembalikan semula tanah-tanah tersebut kepada plaintif-plaintif iaitu di dalam bidang kuasa mereka sebagai pemegang amanah kepada harta pusaka Sheik Eusoff bin Sheik Latiff, H si mati.

(10) Defendan walau bagaimanapun gagal mematuhi permintaan plaintif-plaintif tersebut.

(11) Plaintif-plaintif oleh yang demikian menuntut:

(a) Suatu deklarasi menyatakan bahawa tanah dan hereditamen yang I dahulunya dikenali sebagai Lot No 55(1), Mukim 13, Daerah Timur Laut, Pulau Pinang terkandung di dalam Geran No 477 dan 1767 dan sekarang dikenali sebagai Lot No 1396 terkandung dalam Geran (First Grade) No 23631 berserta dengan sekeping Lot lagi yang dahulunya dikenali sebagai Lot No 193(2), Bandar Georgetown,

Daerah Timur Laut, Pulau Pinang dan sekarang dikenali sebagai Lot No 962, Seksyen 3, Bandar Georgetown terkandung dalam Geran (First Grade) No 21582

dikembalikan kepada pusaka Sheik Eusoff bin Shaik Latiff, si mati.

(b) Perintah selanjutnya meletakkan hak atas nama plaintif-plaintif sebagai pemenang amanah kepada harta pusaka Sheik Eusoff bin Sheik Latiff, si mati kesemua tanah dan hereditamen yang dahulunya dikenali sebagai Lot 55(1), Mukim 13, Daerah Timur Laut, Pulau Pinang yang terkandung dalam Geran No 477 dan 1767 dan sekarang dikenali sebagai Lot No 1396 terkandung dalam Geran (First Grade) No 23631 serta dengan Lot No 193(2), Bandar Georgetown, Daerah Timur Laut, Pulau Pinang yang sekarang dikenali sebagai Lot No 962, Seksyen 3, Bandar Georgetown terkandung dalam Geran (First Grade) No 21582.

(bb) Defendan-defendan hendaklah menunjukkan suatu akaun yang menyatakan kesemua wang yang diterima dan perbelanjaan ke atas hartanah yang dikenali sebagai Lot No 962, Seksyen 3, Bandar Georgetown, Penang dan Lot 1396, Daerah Timur Laut, Penang.

Secara alternatif:

(c) Ganti rugi.

(d) Suatu injunksi menahan defendan atau orang suruhannya atau sesiapa sahaja dari menjual, memindahmilik atau campur tangan atau sebarang tindakan atau urusan ke atas tanah dan hereditamen yang dahulunya dikenali sebagai Lot 55(1), Mukim 13, Daerah Timur Laut, Pulau Pinang yang terkandung dalam Geran No 477 dan 1767 dan sekarang dikenali sebagai Lot No 1396 terkandung dalam Geran (First Grade) No 23631 serta dengan Lot No 193(2), Bandar Georgetown, Daerah Timur Laut, Pulau Pinang yang sekarang dikenali sebagai Lot No 962, Seksyen 3, Bandar Georgetown terkandung dalam Geran (First Grade) No 21582 sehingga tindakan di dalam guaman ini selesai.

(e) Kos.

(f) Faedah.

(g) Apa-apa perintah atau relief yang difikirkan adil dan patut oleh Mahkamah yang mulia.

Bertarikh semula pada 11 Disember 1995.

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Peguam bagi plaintif-plaintif

Pernyataan Pembelaan

(1) Defendan tidak mengakui bahawa plaintif-plaintif adalah pemegang amanah dan juga benefisiari kepada harta pusaka peninggalan Shaik Eusoff. Plaintif-plaintif perlu membuktikan secara kukuh.

(2) Defendan akan membangkitkan bantahan permulaan bahawa Mahkamah Tinggi tidak ada bidang kuasa untuk membicarakan tuntutan plaintif.

(3) Defendan menafikan perenggan ke-(4) pindaan tuntutan plaintif dan meletakkan plaintif kepada bukti kukuh.

(4) Defendan adalah tuan punya berdaftar dan mempunyai hakmilik ke atas tanah-tanah yang dikenali sebagai Lot No 55(1) Mukim 13, Daerah Timur Laut, Pulau Pinang yang terkandung dalam Geran No 477 dan 1767 yang sekarang dikenali sebagai Lot No 1396 terkandung dalam Geran (First Grade) No 23631 dan Lot No 193(2), Bandar Georgetown, Daerah Timur Laut, Pulau Pinang dan sekarang dikenali sebagai Lot No 962, Seksyen 3, Bandar Georgetown, Pulau Pinang terkandung dalam Geran First Grade No 21582 (kemudian daripada ini dikenali sebagai 'tanah-tanah tersebut').

(5) Defendan seterusnya menyatakan bahawa tanah-tanah tersebut dahulunya adalah di atas nama Shaik Eusoff dan mengikut suratikatan persetujuan No 84/1890 bertarikh pada 26 Jun 1890 tanah-tanah tersebut telah diwakafkan untuk kubur keluarga Shaik Eusoff dan diwakafkan untuk kegunaan orang-orang Islam di Pulau Pinang amnya (kemudian daripada ini dikenali sebagai 'suratikatan persetujuan tersebut').

(6) Mengikut enakmen, iaitu Enakmen Pentadbiran Hal Ehwal Agama Islam Negeri Pulau Pinang 1993 (Enakmen No 7 tahun 1993), semua wakaf dan amanah di dalam negeri Pulau Pinang dan semua masjid bersama-samanya berserta harta tak boleh alih yang terletak di atasnya adalah terletak hak pada Majlis Agama Islam Pulau Pinang dan Seberang Perai.

(7) Defendan menyatakan bahawa oleh kerana tanah-tanah tersebut merupakan harta wakaf seperti yang terkandung di dalam suratikatan persetujuan tersebut maka defendan merupakan pemegang amanah tunggal terhadap tanah-tanah tersebut.

(8) Defendan menegaskan bahawa mengikut suratikatan persetujuan tanah, tanah tersebut adalah tanah wakaf dan bahawa penama-penama berikut Mawan Bee/Hajee Bee, Rahimah Bee @ Wan Chee, Fatimah Bee @ Wan Teh, Zoharah Bee @ Wan Tam, Shaik Mohamed Bee @ Chay Aishah, Shaik Sathuck Ally Shah Meeah, Shaik Mohamed Noordin Meeah, Habib Sah Bee @ Habib dan Khatijah Bee @ Jah Bee adalah ditugaskan pada ketika suratikatan persetujuan diperbuat untuk menjadi pemegang amanah untuk melaksanakan wakaf ke atas tanah-tanah tersebut iaitu, pertama, sebahagian tanah tersebut dirizabkan sebagai kubur untuk Shaik Eusoff, isteri dan keluarganya dan, kedua, sebagai wakaf untuk kepentingan orang-orang Islam di Pulau Pinang. Ini termaktub di dalam suratikatan persetujuan yang akan dirujuk secara terperinci di dalam perbicaraan nanti.

(9) Defendan tidak mempunyai pengetahuan perenggan ke-(7) tuntutan plaintif dan meletakkan plaintif kepada bukti kukuh. Defendan seterusnya menegaskan bahawa suratikatan persetujuan tersebut tidak dinyatakan yang tanah-tanah tersebut perlu dikembalikan kepada sesiapapun tetapi sebaliknya tanah-tanah tersebut hendaklah kekal sebagai tanah wakaf untuk kubur keluarga Shaik Eusoff dan diwakafkan untuk kegunaan orang-orang Islam di Pulau Pinang amnya seperti yang dikehendaki oleh Shaik Eusoff.

(10) Perenggan ke-(8) pindaan semula pernyataan tuntutan adalah diperakui.

(11) Defendan seterusnya menyatakan bahawa plaintif-plaintif tidak mempunyai sebarang kedudukan di sisi undang-undang (locus standi) untuk mendakwa dan membuat tuntutan dalam perkara ini. Defendan menegaskan bahawa defendan adalah pemegang amanah tunggal harta

wakaf di negeri Pulau Pinang dengan itu mempunyai hak ke atas tanah-tanah tersebut. A

(12) Defendan menyatakan bahawa plaintif-plaintif bersetuju bahawa tanah-tanah tersebut terletak hak kepada defendan. Seterusnya, defendan menyatakan bahawa undang-undang di bawah Enakmen Pentadbiran Hal Ehwal Agama Islam Negeri Pulau Pinang 1993 (Enakmen No 7 tahun 1993), memberi kuasa kepada defendan untuk mentadbir tanah-tanah tersebut. B

(13) Dengan yang demikian, defendan merayu supaya tuntutan plaintif-plaintif ditolak dengan kos.

(14) Kecuali seperti yang diakui atau tidak diakui secara nyata seperti di atas, defendan menafikan setiap dan semua tuntutan dan dakwaan secara seriatim dan disangkal secara khusus. C

Bertarikh pada 22 April 1996.

.....
Peguam bagi defendan D

What is a reasonable course of action or a reasonable defence? In *Penang Development Corp v Khaw Chin Boo & Anor* [1993] 2 MLJ 161, Mohd Dzaiddin J (as he then was) adopted Lord Pearson's enunciation in *Drummond-Jackson v British Medical Association & Ors* [1970] 1 WLR 688, 'that a reasonable course of action means a course of action with some E chance of success when (as required by para (2) of the rule) only the allegations in the pleadings are considered'. In *Sea Breeze Navigation Co SA v 'Hsing An' Owners* [1974] 1 MLJ 45, Chua J held it is not the function of the court in an application under r 19(1)(a) to try the issues but to decide simply whether there is a triable issue. And in *Tun Datuk Hj Mustapha bin Datu Harun v State Legislative Assembly of Sabah & Anor* F [1993] 1 MLJ 26, it was held that a reasonable course of action would be satisfied if a substantial issue has been raised for the court's determination and the plaintiff has some genuine interest in the remedy sought. 'The mere fact that the case is weak and unlikely to succeed is no ground for striking out the statement of claim' (*Mallal's Supreme Court Practice* (2nd G Ed) para 18/19/2; see also the *English Supreme Court Practice* (1995) para 18/19/11).

However, a court will only exercise its powers to strike out pleadings under any of the four grounds in r 19(1) in plain and obvious cases, a point repeatedly made by the courts and in *Bandar Builder Sdn Bhd & Ors v* H *United Malayan Banking Corp Bhd* [1993] 3 MLJ 36, where the (then) Supreme Court restated that: (i) the principle upon which the court acts in exercising its power under any of the four limbs in r 19(1) is only in plain and obvious cases that recourse should be had to this summary process; (ii) this summary process can only be adopted when it can clearly be seen I that a claim or defence is on the face of it obviously unsustainable; and (iii) that power to strike out cannot be exercised by a minute examination of the documents and the facts of the case in order to see whether a party has a course of action or defence. On the court's examination of documents and generally on applications to strike out actions, the following excerpt

A from the judgment of Edgar Joseph Jr SCJ (now FCJ) in *Noor Jahan bte Abdul Wahab v Md Yusoff bin Amanshah & Anor* [1994] 1 MLJ 156 at p 164 is also instructive:

> ... on an application to strike out the statement of claim or to dismiss the action, it is not permissible to try the action on affidavits when the facts and
B issues are in dispute (see *Wenlock v Moloney* [1965] 2 All ER 871). Also to be borne in mind is the principle that the court will not permit a plaintiff to be driven from the judgment seat 'except in cases where the cause of action was obviously bad and almost incontestably bad' (per Fletcher Moulton LJ in *Dyson v A-G* [1911] 1 KB 410 at p 419).

C The court's inherent jurisdiction to stay all proceedings before it which are obviously frivolous or vexatious or an abuse of its process — and in such cases, it will strike out part of an indorsement of a writ or set aside service of it or will stay or dismiss before the hearing, actions which it holds to be frivolous or vexatious (see the *English Supreme Court Practice* (1995) para 18/19/36) — is also exercised with the same circumspection and only when
D it is perfectly clear that the plea cannot succeed (see the illustrations in the *English Supreme Court Practice* (1995) para 18/19/37).

Since this application was brought under r 19(1)(a) and the inherent jurisdiction of the court, it must follow, would it not, that the arguments from the defendant would be that the claim is plainly and obviously
E unsustainable and/or that it is obviously vexatious and/or frivolous. Strangely, that was not to be. The defence, apart from the factual assertions, is an assertion, though extended, that the plaint relates to '*wakaf*', a subject matter within the exclusive jurisdiction of the Syariah courts, and that the High Court has no jurisdiction to hear and determine the plaint, whilst the submissions from both counsel were riveted — solely, it should
F be said — to the question of the jurisdiction of the High Court and Syariah courts; r 19(1)(a) and the inherent jurisdiction of the court were left in the byway by both counsel in their submission.

Pertinent to Mr Ong's submission 'the High Court has no jurisdiction to hear the case' — and Mr Ong meant that the High Court has no
G jurisdiction of the subject matter in that the High Court has no legal authority or powers to adjudicate on the plaint — is the unconditional appearance of the defendant. The learned authors of *Mallal's Supreme Court Practice* (2nd Ed) at 12/1/4 have it that an unconditional appearance is a waiver of any irregularity and is a submission to the jurisdiction of the court. However, the defendant's unconditional appearance, if it was a
H submission to the jurisdiction of the High Court, would only be real if the High Court has the authority to adjudicate on the plaintiffs' plaint. A case in point is *Tengku Ali ibni Almarhum Sultan Ismail v Kerajaan Negeri Terengganu Darul Iman* [1994] 2 MLJ 83, where the plaintiff sought a declaration that he was the Sultan of the State of Terengganu from
I 26 September 1942 to 5 November 1945 and where it was held that by filing an unconditional appearance the defendant was precluded from raising the issue of the court's lack of jurisdiction and that there were no legal impediments for the court to adjudicate upon the claim of the plaintiff. But a submission to the jurisdiction of a court would be an illusion if the court has no jurisdiction to entertain the particular action or matter.

On consent and waiver to the jurisdiction of a court, the learned authors of 10 *Halsbury's Laws of England* (4th Ed) para 718 propounded it as follows:

> Where, by a reason of any limitation imposed by statute, charter, or commission, a court is without jurisdiction to entertain any particular action or matter, neither the acquiescence or the express consent of the parties can confer jurisdiction upon the court nor can consent give jurisdiction if a condition which goes to the jurisdiction has not been performed or fulfilled. Where the court has jurisdiction over the particular subject matter of the action or the particular parties and the only objection is whether, in the circumstances of the case, the court ought to exercise jurisdiction, the parties may agree to give jurisdiction in their particular case; or a defendant by entering an appearance without protest, or by taking any steps in the action may waive his right to object to the court taking cognizance of the proceedings. No appearance or answer, however, can give jurisdiction to a limited court, nor can a private individual impose on a judge the jurisdiction or duty to adjudicate on a matter. A statute limiting the jurisdiction may contain provisions enabling the parties to extend the jurisdiction by consent, but an appellate court cannot reverse a decision by consent.

In the case of the High Court, it is undoubtedly a creature of statute, and its judicial authority, derived from written laws, is limited by written laws. It has the jurisdiction and powers as may be conferred by or under Federal law. Sections 22, 23 and 24 of the Courts of Judicature Act 1964 set out, in broad terms, the criminal and civil jurisdiction of the High Court. Section 25(1) of the same Act provides that the High Court:

> ... shall in the exercise of its jurisdiction have all the powers which were vested in it immediately prior to Malaysia Day and such other powers as may be vested in it by any written law in force within its local jurisdiction.

The High Court also has the additional powers set out in the Schedule to the Act. Section 3(1)(a) of the Civil Law Act 1956, effective 7 April 1956, provides that a court of competent jurisdiction administering civil law in West Malaysia shall apply the common law of England and the rules of equity as administered in England on 7 April 1956.

On the powers of the superior courts, Hashim Yeop A Sani J (as he then was), in *Zainal Abidin bin Hj Abdul Rahman v Century Hotel Sdn Bhd* [1982] 1 MLJ 40, deduced the following propositions:

(1) the jurisdiction of the High Court is 'unlimited' in the sense that it is as wide a jurisdiction as that of the High Court in England;

(2) the expression 'unlimited jurisdiction' however merely describes the extent or area where the judicial authority or power of the High Court is exercisable;

(3) the manner in which the judicial authority or power of the High Court is exercised is not unlimited; and

(4) because the High Court is a creature of statute, all powers must be derived from a written law, expressly or by necessary implication.

A One key restraint on the judicial authority of the High Court is art 121(1A) of the Federal Constitution, effective 10 June 1988, which reads:

> The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.

B The High Court, in the plain and distinct language of art 121(1A), has no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts. It means, abiding by the meaning of unambiguous words, that the High Court will have no jurisdiction if jurisdiction in respect of any matter is given to the Syariah court, and that the High Court will have jurisdiction if jurisdiction in respect of any matter is not given to the Syariah court.
C Any other construction, *verbis standum ubi nulla ambiguitas*, is not permitted. In *Mohamed Habibullah bin Mahmood v Faridah bte Dato' Talib* [1992] 2 MLJ 793 at p 800, the Supreme Court, per Harun Hashim SCJ, pronounced as follows:

> D It is obvious that the intention of Parliament by art 121(1A) is to take away the jurisdiction of the High Courts in respect of any matter within the jurisdiction of the Syariah Court: *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1. I am therefore of the opinion that when there is a challenge to jurisdiction, as here, the correct approach is to firstly see whether the Syariah Court has jurisdiction ... .

E That art 121(1A) has taken away the jurisdiction of the High Court in respect of matters falling within the jurisdiction of the Syariah court was also articulated by the Supreme Court in *Tan Sung Mooi v Too Miew Kim* [1994] 3 MLJ 117. Clearly, the jurisdiction of the High Court is not taken away if the jurisdiction of a matter does not fall within the jurisdiction of the Syariah court.

F Therefore, when there is a challenge to the jurisdiction of the High Court, the key is not whether the High Court has jurisdiction but whether jurisdiction of the matter at hand is with the Syariah court. But art 121(1A) is not the written law giving jurisdiction to the Syariah court. It merely settles the issue of the concurrent jurisdiction of the High Court, in that there is none,
G when jurisdiction of a subject matter is given to the Syariah court.

Jurisdiction to the Syariah court (and it is only within the state) is given by state laws, or for the Federal Territories, by an Act of Parliament, over any matter in the State List under the Ninth Schedule of the Federal Constitution (see *Ng Wan Chan v Majlis Ugama Islam Wilayah Persekutuan & Anor (No 2)* [1991] 3 MLJ 487), but if state law does not confer on the
H Syariah court any jurisdiction to deal with any matter in the State List, the Syariah court is precluded from dealing with the matter, and jurisdiction cannot be derived by implication: *Ng Wan Chan v Majlis Ugama Islam Wilayah Persekutuan & Anor (No 2)* per Eusoff Chin J (as he then was).

The Federal Constitution provides that a legislature of a state may
I make laws — without prejudice however to the federal legislature's powers to make laws with respect to any of the matters enumerated in the Federal list or the concurrent lists (ie the First or Third lists set out in the Ninth Schedule) — with respect to any of the matters enumerated in the State list

(ie the second list set out in the Ninth Schedule) or the concurrent lists; incidentally, art 75 provides that any state law inconsistent with a federal law 'shall be void'.

Articles 74 and 77 of the Federal Constitution provide as follows:

74 (1) Without prejudice to any power to make laws conferred on it by any other Article, Parliament may made laws with respect to any of the matters enumerated in the Federal List or the Concurrent List (that is to say, the First or Third List set out in the Ninth Schedule).

(2) Without prejudice to any power to make laws conferred on it by any other Article, the Legislature of a State may make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List.

(3) The power to make laws conferred by this Article is exercisable subject to any conditions or restrictions imposed with respect to any particular matter by this Constitution.

(4) Where general as well as specific expressions are used in describing any of the matters enumerated in the Lists set out in the Ninth Schedule the generality of the former shall not be taken to be limited by the latter.

...

77 The Legislature of a State shall have power to make laws with respect to any matter not enumerated in any of the Lists set out in the Ninth Schedule, not being a matter in respect of which Parliament has power to make laws.

The State list, that is List II of the Ninth Schedule, reads as follows:

List II — State List

1 Except with respect to the Federal Territories of Kuala Lumpur and Labuan, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs; Zakat, Fitrah and Baitulmal or similar Islamic religious revenue; mosques or any Islamic public places of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution, organisation and procedure of Syariah courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law, the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom.

A 2 ...

12 Turtles and riverine fishing.

12A Libraries, museums, ancient and historical monuments and records and archaeological sites and remains, other than those declared to be federal by or under federal law.

B In the state of Penang, the state legislature enacted, pursuant to arts 74 and 77 read together with List II of the Ninth Schedule, the Administration of Islamic Religious Affairs Enactment of the State of Penang 1993 ('the Penang Enactment'), an enactment concerning the administration and enforcement of the Islamic religious affairs, regulation and management of C Islamic religious authority and related matters. In particular, s 48 of the Penang Enactment provides:

48 (1) A Syariah High Court shall have jurisdiction throughout the State of Penang and shall be presided over by a Syariah Judge.

(2) A Syariah High Court shall —

D (a) in its criminal jurisdiction, try any offence committed by a Muslim and punishable under this Enactment or under any other written law prescribing offences against precepts of the religion of Islam for the time being in force, and may impose any punishment provided therefor;

(b) in its civil jurisdiction, hear and determine all actions and proceedings in which all the parties are Muslims and which E relate to —

(i) betrothal, marriage, *ruju'*, divorce, nullity of marriage (*fasakh*), *nusyuz* or judicial separation (*faraq*) or other matters relating to the relationship between husband and wife;

F (ii) any disposition of, or claim to, property arising out of any of the matters set out in Subparagraph (i);

(iii) the maintenance of dependants, legitimacy, or guardianship or custody (*hadhanah*) of infants;

(iv) the division of, or claims to, *harta sepencarian*;

(v) wills or death-bed gifts (*marad-al-maut*) of a deceased Muslim;

G (vi) gifts *inter vivos*, or settlements made without adequate consideration in money or money's worth, by a Muslim;

(vii) *wakaf* or *nazar*;

(viii) division and inheritance of testate or intestate property;

(ix) the determination of the persons entitled to share in the estate of a deceased Muslim or of the shares to which H such persons are respectively entitled; or

(x) other matters in respect of which jurisdiction is conferred by any written law.

With regard to the instant application, the applicable text reads as follows:

I A Syariah High Court shall ... in its civil jurisdiction, hear and determine all actions and proceedings in which all the parties are Muslims and which relate to ... *wakaf* or *nazar*.

It should be noted that the legislatures in the other states also enact laws concerning the administration and enforcement of Islamic religious affairs,

regulation and management of Islamic religious authority and related matters for their states, and the Syariah court of one state is not necessarily endowed with the powers and authority given the Syariah court of another state. Consequentially, judicial construction on the jurisdiction of the Syariah court of another state — and it will be the construction of a non-applicable enactment — must yield to the construction given the Penang Enactment in the instant case. A B

The following cases illustrate the court's interpretation of the Penang Enactment.

In *G Rethinasamy v Majlis Ugama Islam, Pulau Pinang & Satu lagi* [1993] 2 MLJ 166, the plaintiff, the registered proprietor of Lot 1214 Georgetown, sought a declaration that he was entitled to vacant possession and possession without interference of the land he had purchased, and claimed for damages interest and costs. The defendants alleged in the defence that a portion of the lot was '*wakaf*' and therefore statutorily vested with the first defendant (pursuant to s 105 of the Penang Administration of Islamic Religion Enactment 1959 — now repealed by the Penang Enactment) and that an estoppel had arisen against the plaintiff's claim. On the issue of the jurisdiction of the civil courts to decide on Syariah law where the issues were under the jurisdiction of the civil and Syariah courts, the learned trial judge, Abdul Hamid J held that the plaintiff's claim was not a matter within the jurisdiction of the Syariah court and that the asserted estoppel could only be determined by a civil court. C D E

In *Lim Chan Seng & Satu lagi lwn Pengarah Jabatan Agama Islam Pulau Pinang & Satu lagi* [1996] 3 CLJ 231, where the plaintiffs sought a declaration that they had lawfully renounced the Islamic faith by their deed polls and the defendant challenged the jurisdiction of the High Court to entertain the plaintiffs' actions by an application to strike out the action under O 18 r 19(1)(i), (ii) and (iii) of the RHC, Abdul Hamid Mohd J asked (at p 241), 'Apakah kesan peruntukan perkara 121(1A) itu?' His lordship replied: F

> Perkara 121(1A) bukan memberi bidang kuasa kepada Mahkamah Syariah. Tetapi ia cuma mengatakan jika sesuatu perkara itu terletak dalam bidang kuasa Mahkamah Syariah maka Mahkamah Tinggi dan mahkamah bawahan ... tidak mempunyai bidang kuasa mengenainya. G

Inter alia, the learned judge held: (i) to determine whether the High Court has jurisdiction in any matter, it must be established foremost whether the jurisdiction in the matter concerned is with the Syariah court; (ii) where jurisdiction is with the Syariah court, it would not be with the civil courts; (iii) the jurisdiction and powers of the Syariah court are in the state enactment concerned, and by any other law; (iv) art 121(1A) does not automatically vest the Syariah court with jurisdiction; (v) legislation by the state legislature is required if the Syariah court is to be vested with the jurisdiction and powers on any matter in the State List; and (vi) it is within the province of the High Court to interpret all state laws concerning the administration of Islamic law (see also *Dalip Kaur v Pegawai Polis Daerah,* H I

A *Balai Polis Daerah Bukit Mertajam & Anor* [1992] 1 MLJ 1). Observing that there is nothing in the Penang Enactment that in any way empowers the Syariah court to adjudicate on the issue of apostacy or on the validity or otherwise of an alleged renunciation and that there was no provision to indicate that the plaintiffs' actions ought to be made to the Syariah court, B the learned judge held, dismissing the defendant's application, that the Syariah court had not been accorded with jurisdiction and there was no impediment for the civil court to hear and dispose of the actions.

And in *Barkath Ali bin Abu Backer v Anwar Kabir bin Abu Backer & Ors* [1997] 4 MLJ 389, where the plaintiff sought orders answering the C status of the assets of the settlor in Malaysia and Singapore — whether it was 'transferred' to the Hadijabe Trust of Koothanallur, India or whether it was a part of the residuary estate to be distributed to the settlor's beneficiaries — and the third defendant challenged the jurisdiction of the High Court to hear the action on the ground that the settlor had declared that her trust was a '*wakaf-au-aulad*' and only the Syariah court had the D jurisdiction to determine the questions put forward by the plaintiff, this court held that the real order sought was a declaration that the Syariah court had no powers to grant nor to construe or interpret the deeds and instruments of the settlor to determine if there was a valid trust.

Looking at the relief sought to determine if the Syariah court is E vested with jurisdiction, the approach is not without superior authority: in *Majlis Agama Pulau Pinang lwn Isa Abdul Rahman & Satu lagi* [1992] 2 MLJ 244, the (then) Supreme Court held — dismissing the appeal against the decision of the High Court dismissing the appellant's application to set aside the respondents' claim, inter alia, for a declaration and for a F perpetual injunction to restrain the appellant's intended demolition of a mosque on land originally given as '*wakaf am*' — that the real order asked for was the perpetual injunction and that the Syariah court had no jurisdiction to issue the injunction applied for by the respondents.

It is timely to revert to the pleadings. In their statement of claim, the G plaintiffs seek the following relief: (i) a declaration that Lots 55(1) and 193(2) Georgetown revert to the estate of the deceased; (ii) further to (i), an order vesting the said lands to the estate of the deceased; and (iii) an account of the receipts and outgoings of lot 193(2). The plaintiffs seek, in the alternative, the following relief: (i) damages; (ii) an injunction to restrain the defendant and its servants or agents from disposing, interfering H or otherwise from dealing with the said lands until the final disposal of this action; (iii) costs; (iv) interest; and (v) such further or other relief as the court deems fit.

The statement of claim avers to the following:

I (i) the plaintiffs are the trustees and beneficiaries of the estate of the deceased;

(ii) the deceased died possessed of the said lands;

(iii) the deceased left a last will dated 30 December 1892;

(iv) probate of the estate of the deceased was granted to the wife of the deceased on 22 October 1894;

(v) the will provided that the said lands shall be reserved as a '*wakoff*' for the benefit of 'Shaik Eusoff's mosque' during the lifetime of ... (wife and children) and for a period of 21 years after the demise of the last survivor;

(vi) the last survivor is dead and 21 years had lapsed;

(vii) the plaintiffs applied to the defendant for the return of the said lands to the plaintiffs as the trustees of the deceased;

(viii) the defendant refused to return the said lands to the plaintiffs.

The defence avers to the following:

(i) the plaintiffs are not the trustees or beneficiaries of the deceased;

(ii) the High Court has no jurisdiction to hear the action;

(iii) a denial of the will 30 December 1892 and a demand for strict proof of the will 30 December 1892;

(iv) the defendant is the registered proprietor of the said lands;

(v) pursuant to a deed of settlement No 84/1890 dated 26 June 1890 the said land was '*wakafkan*' by the deceased as a cemetery for himself and his family and for persons professing the Islamic faith in Penang;

(vi) pursuant to the provisions of the Penang Enactment, the defendant is vested with all '*wakaf*' lands and mosques in Penang;

(vii) the said lands are '*wakaf*' lands, and the defendant is the sole trustee of the said lands;

(viii) pursuant to the provisions of the deed of settlement, the wife and children of the deceased were appointed trustees to carry out the '*wakaf*' to maintain a portion of the said lands as a cemetery, firstly for the deceased, the deceased's wife and the deceased's children, and, secondly for persons professing the Islamic faith in Penang;

(ix) the defendant has no knowledge that the wife and children of the deceased have passed away or that the said 21 years had lapsed;

(x) the deed of settlement is silent on the reversion of the said land to the estate of the deceased;

(x) the said land must remain as *wakaf* land for the cemetery,

(xi) the plaintiffs have no locus standi to maintain the action; the defendant is the trustee of the said lands;

(xii) the plaintiffs agreed to the land being vested with the defendant; alternatively, the defendant is vested with the authority to administer the lands; and

(xiii) that the plaintiffs' action be dismissed with costs.

Disclosed therefore are two opposing versions regarding the said land. While the plaintiffs have it that the said land should revert to the estate of the deceased, the defendant has it that the said land should remain as '*wakaf*' land. Also disclosed are two instruments of the deceased, to wit, a

will dated 30 December 1892 allegedly providing that the said land shall be reserved as a '*wakoff*' for the benefit of 'Shaik Eusoff's mosque' during the lifetime of ... (wife and children) and for a period of 21 years after the demise of the last survivor, and a deed of settlement No 84/1890 dated 26 June 1890 allegedly providing that the said land shall be '*wakafkan*' as a cemetery for the deceased, his family and for persons professing the Islamic faith in Penang.

Plainly, when considering alone the allegations in the pleadings, it is neither plain nor obvious that the claim is obviously unsustainable. Indeed, neither the claim nor the defence is not without some chance of success. The affidavit evidence admissible (encls 8 and 10) on the inherent jurisdiction ground — and it is merely an affirmation of the facts alleged in the pleadings — does not bear out that the plaintiffs' claim is obviously frivolous or vexatious or an abuse of the process of court. That it was not contended during submissions that the claim discloses no reasonable course of action or that it is frivolous, vexatious or an abuse of the court's process, not arguing and justifying therefore the grounds under which the application was brought belies the seriousness of the grounds under which this application was brought. That is reason enough to dismiss this application brought under r 19(1)(a) and under the inherent jurisdiction of the court. However, as in the case of the unconditional appearance and the supposed submission to the jurisdiction of this court, a refusal of the defendant's application under r 19(1)(a) and the inherent jurisdiction of the court would be idle if the claim cannot be heard or be adjudicated by the High Court by reasons of want of jurisdiction. It was for that reason that the defendant's application to strike out the plaintiff's writ and amended statement of claim — notwithstanding that the ground under which it was brought was not argued and therefore impliedly abandoned — was not dismissed summarily but was considered on the ground of the jurisdiction of the High Court and Syariah court.

Jurisdiction has not been given to the Syariah court to grant the declaration, the vesting order or the alternative relief. Neither is there any power to the Syariah court to adjudicate on the will and the deed of settlement. That jurisdiction rests with the civil courts, and there is no impediment to this court hearing and adjudicating on the will and deed of settlement and to grant or refuse any of the relief sought.

The appeal is therefore dismissed with costs.

Appeal dismissed.

Reported by Lew Chee Seong